4-6.000
FEDERAL PROGRAMS

4-6.010

Federal Programs Branch -- Subject Matter Areas

The Federal Programs Branch litigates on behalf of approximately 100 departments and federal agencies, Cabinet officers, and other government officials. The Branch's caseload consists primarily of defending suits that challenge actions of Government agencies and officers in which the plaintiffs seek injunctive or declaratory relief. Since the enactment of the amendments to the Civil Rights Act in 1991, however, the Branch has seen an increase in Title VII litigation. In addition, the Federal Programs Branch brings actions in the name of the United States

or federal agencies to enforce Government rights, functions and certain claims for monetary relief. The Branch's eleven subject matter areas are as follows: **Area 1 -- Affirmative Litigation and Regulatory Enforcement**
Director: David J. Anderson , Room 1064, 901 E Street, (202) 514-3354.
Assistant Director: Arthur R. Goldberg, Room 1066, 901 E Street, (202) 514-4783.

Area 2 -- Non-Discrimination Personnel Litigation
Director: Felix V. Baxter, Room 972, 901 E Street, (202) 514-4651.
Assistant Director: Susan K. Rudy, Room 970, 901 E Street, (202) 514-2071.

Area 3 -- Government Information (Includes Freedom of Information Act, Privacy Act, Government in Sunshine Act, Federal Advisory Committee Act and Defense to Third Party Subpoena Litigation)
Director: David J. Anderson, Room 1064, 901 E Street, (202) 514-3354.
Assistant Director: Anne L. Weismann, Room 1034, 901 E Street, (202) 514-3395.

Area 4 -- Human Resources (Includes Department of Health and Human Services and Department of Education)
Director: David J. Anderson, Room 1064, 901 E Street, (202) 514-3354.
Deputy Director: Sheila Lieber, Room 974, 901 E Street, (202) 514-3786.

Area 5 -- Housing and Community Development (Includes Department of Housing and Urban Development and Federal Emergency Management Agency)
Director: Dennis G. Linder, Room 980, 901 E Street, (202) 514-3314.
Assistant Director: Michael Sitcov, Room 1022, 901 E Street, (202) 514-1944.

Area 6 -- National Security, Military and Foreign Relations
Director: David J. Anderson, Room 1064, 901 E street, (202) 514-3354.
Deputy Director: Vincent M. Garvey, Room 1062, 901 E Street, (202) 514-3449 .

Area 7 -- Agriculture, Energy and Interior
Director: Dennis G. Linder, Room 980, 901 E Street, (202) 514-3314.
Assistant Director: Thomas W. Millet, Room 982, 901 Street, (202) 514-3313.

Area 8 -- Foreign and Domestic Commerce (Includes Departments of Commerce, Labor, Treasury and Transportation)
Director: Dennis G. Linder, Room 980, 901 E Street, (202) 514-3314.
Assistant Director: Sandra Schraibman, Room 976, 901 E Street, (202) 514-3315.

Area 9 -- Government Corporations and Regulatory Agencies
Director: Dennis G. Linder, Room 980, 901 E Street, (202) 514-3314.
Assistant Director: Theodore Hirt, Room 906, 901 E Street, (202) 514-4785.

Area 10 -- Employment Discrimination Litigation
Director: Felix V. Baxter, Room 972, 901 E Street, (202) 514-4651
Assistant Directors: Anne M. Gulyassy, Room 968, 901 E Street, (202) 514-3527; Jennifer D. Rivera Room 978, 901 E Street, (202) 514-3671.

Area 11 -- Disability Benefits and Employment Litigation
Director: Felix V. Baxter, Room 972, 901 E Street, (202) 514-4651.
Assistant Director: Richard Lepley, Room 966, 901 E Street, (202) 514-3492.

4-6.100 Defensive Litigation

With the exception of the categories of Direct Reference Cases discussed in Section 4-1.310, as soon as a USAO is served with a summons and complaint in a new action which falls within the jurisdiction of the Federal Programs Branch, the USAO should transmit copies of the pleadings to the Branch. Upon receipt of the

pleadings, the Branch will determine the type of handling the case is to receive. Federal Programs Branch cases will be designated for one of the following types of handling:

- Personally Handled (P) cases are handled by Branch attorneys. These cases will often involve serious or novel constitutional or statutory challenges to federal programs, cases challenging a nationwide program, with potentially far-reaching implications, cases in which either the client agency or the USAO has requested assistance, or cases that for whatever additional reason justify the use of resources of the Civil Division from Washington, D.C. Where practical, the Federal Programs Branch will consult with the United States Attorney before designating a case to be personally handled. See section 4(c) of Civil Division Directive No. 163-86 (published in the Appendix to Subpart Y immediately following 28 C.F.R. § 0.172) for types of cases that are frequently retained for personal handling by Civil Division attorneys.
- Jointly Handled (JH) cases are those in which both a Branch attorney and an Assistant United States Attorney will each personally handle aspects of the litigation.
- Monitored (M) cases are handled by Assistant United States Attorneys, with Civil Division attorneys responsible for being knowledgeable about case developments and strategy and available for advice and consultation.
- Delegated (D) cases are handled by Assistant United States Attorneys, with involvement by Branch attorneys only on request. See Section 4(b) of Civil Division Directive No. 163-86, for criteria for delegation of cases to USAOs.

As soon as the type of handling is determined, the Federal Programs Branch will request that the client agency prepare a litigation report for the case, and a copy of that request will be forwarded to the appropriate USAO. In delegated and monitored cases, the litigation report request letter will be the first official notification to the USAO that that office, rather than the Civil Division, will have primary litigation responsibility for the case. The request letter from the Branch will request that the agency forward the litigation report, with supporting documents, to the appropriate USAO.

In personally handled and jointly handled cases, the Assistant Branch Director assigned to the case will notify the USAO that the Civil Division will retain litigation responsibility for the case. In those cases, the Federal Programs Branch attorney assigned to the case will receive the litigation report from the client agency.

4-6.200 Affirmative Litigation

Two basic differences between affirmative and defensive suits require particular attention. First, with the exception of the Direct Reference Cases discussed in Section 4-1.310 *et seq.*, all affirmative cases must be authorized by the Civil Division. Second, several categories of affirmative cases are routinely handled by client agencies, pursuant to Memoranda of Understanding with the Justice Department.

To receive authorization for commencement of an affirmative suit, the client agency should prepare a written referral to the Civil Division. See USAM 4-1.450 for discussion of contents of referrals. If a referral is made directly to a USAO and the case is not within the category of Direct Reference cases, the USAO should request that the agency formally refer the matter to the Civil Division for suit authorization. Upon receipt of a referral, the Branch will assign the referral to a Branch attorney for preparation of a suit authorization recommendation.

Once suit authorization is received, the Federal Programs Branch will determine whether the suit will be handled by the Branch, by a USAO, or by the client agency. The most common categories of affirmative suits in the Branch, and the procedures for suit authorization and case handling, are discussed below.

4-6.210 Delegated Affirmative Cases

Delegated affirmative cases will usually be of three types: (1) those delegated to USAOs for handling by those offices; (2) those for which the agency has statutory litigating authority; and (3) those for which the agency is delegated litigating authority pursuant to a Memorandum of Understanding with the Justice Department. The most common delegated affirmative cases are:

A. Department of Labor (cases brought under the Employee Retirement Income Security Act, the Occupational Health and Safety Act, the Migrant and Seasonal Agricultural Worker Protection Act, and the Federal Coal Mine Health and Safety Act). Suits under each of these statutes will normally be handled by Labor Department attorneys. *See* Civil Division Compendium of Departments and Agencies with Authority Either by Statute or Agreement to Represent Themselves in Civil Litigation, June 1993. In such cases, a Branch attorney will review the referral and proposed pleadings for form and content. If the papers indicate that the proposed suit has an adequate factual and legal basis, after conferring with the Assistant Director for Area 1, the Branch attorney will prepare letters to the agency and United States Attorney authorizing the filing of the suit, and delegating the case to the agency. (In those cases where time will not permit a letter authorizing that suit be filed, after conferring with the reviewer, authorization may be given by phone, with confirmation letters to follow.) In most cases under these statutes, it will not be necessary to obtain formal authorization for the suit from the Assistant Attorney General. However, if any of these cases present novel or sensitive issues, it may be appropriate to notify the Assistant Attorney General of the proposed litigation.

B. Cases under the Labor Management Reporting and Disclosure Act. Most LMRDA suits are handled by the USAOs. After reviewing the referral and proposed pleadings for an LMRDA suit, the Branch attorney will confer with the Assistant Director about whether the proposed litigation has an adequate factual and legal basis. If it is appropriate to authorize suit, the Branch attorney will prepare a letter to the appropriate United States Attorney, indicating that the suit is authorized and is delegated to that office, and requesting that a referral acknowledgement form be returned, which shows the date of filing and the name of the Assistant United States Attorney to whom the case is assigned. A copy of the letter will be sent to the Labor Department. In most cases, the letter to the United States Attorney will request that the suit be filed within two weeks of receipt, unless extenuating circumstances are present.

C. Subpoena Enforcement Suits. Most routine subpoena enforcement actions are handled by the USAOs and are authorized by the Director in charge of Area 1. A Branch attorney will review the referral and proposed pleadings, and then prepare a memorandum from the assistant director to the director, recommending whether the suit should be filed.

If the subpoena enforcement action is approved by the director, the Branch attorney will write the agency and the United States Attorney, stating whether the suit has been authorized or not, and, if so, that it is delegated to the United States Attorney. In cases in which suit is authorized, a referral acknowledgement form will also be sent to the United States Attorney, as well as a copy of papers received from the agency.

D. Other Delegated Affirmative Suits. For all other delegated affirmative cases, such as Department of Energy enforcement actions, suits under the various Department of Agriculture statutes, and miscellaneous affirmative litigation, the assigned Branch attorneys will review the litigation request and analysis, and prepare a suit authorization memorandum for the Assistant Attorney General. If the suit is authorized, the Branch attorney will prepare a delegation letter with acknowledgement form to the United States Attorney, and a follow-up letter to the agency.

4-6.220 Monitored Affirmative Cases

Referrals of monitored affirmative cases will be handled in the same manner as delegated case referrals. However, the letter to the USAO or to the agency will advise that a Branch attorney will follow the litigation closely and request that the Branch attorney be kept informed about the status of the case.

4-6.230 Personally Handled and Jointly Handled Affirmative Cases

Personally handled and jointly handled affirmative cases are referred and authorized in the same manner as delegated and monitored cases. The Assistant Director for affirmative litigation in the Federal Programs Branch will notify the appropriate USAO that the Branch will retain primary litigation responsibility in these cases. On occasion, it may become necessary for the Branch to request assistance from the USAOs in filing the summons and complaint in affirmative cases.

4-6.240 Affirmative Cases -- Suits Against State Governments, Agencies or Entities

It is the policy of the Justice Department that, prior to filing suit against a state government, agency or entity, each Division will undertake the following steps:

A. Advise the governor and attorney general of the affected state of the nature of the contemplated action or claim and the terms of the remedy sought;

B. Notify the Deputy Attorney General and, if appropriate, the Associate Attorney General that such prior notification has been given; and

C. Ensure that such prior notice is given sufficiently in advance of the filing of the suit or claim to:

1. Permit the state government, agency or entity to bring to the Department's attention facts or issues relevant to whether the action or claim should be filed or,

2. Result in settlement of the action or claim in advance of its filing on terms acceptable to the United States.

See Attorney General Policy Directive, Litigation Against State Governments, Agencies or Entities, August 7, 1981.

When referrals are received for suits against states, the Branch will prepare a suit authorization memorandum to the Assistant Attorney General for the Civil Division, and will also prepare notification letters to the governor and attorney general of the state. Suit will be filed in such cases only after written suit authorization is given, prior notification has been provided the state, the Deputy (and, where appropriate, Associate) Attorney General has been notified, and the state has been given the opportunity to confer and attempt to compromise the claim without litigation. The Civil Division will supply the interested United States Attorney with copies of the notification letters.

4-6.250 Affirmative Cases -- Counterclaims, Amicus Participation and Motions to Intervene

Client agency requests to assert counterclaims in pending defensive litigation, to participate as amicus curiae, or to intervene in on-going state or federal court litigation are authorized in the same manner as affirmative cases. The Civil Division should also be provided the factual and legal basis supporting the cause of action or position the client wishes to assert. Referrals for such litigation must be made as expeditiously as possible, since the federal government's right to participate in on-going litigation will often depend on the status of the underlying case.

4-6.300 Area 1 -- Affirmative Litigation and Regulatory Enforcement

This area includes all affirmative litigation assigned to the Branch in which the United States or an agency or official of the United States initiates a legal action to enforce compliance with federal statutory and regulatory programs, including, for example, actions to enforce administrative subpoenas, suits by the Department of Labor to enforce the Employee Retirement Income Security Act, the Occupational Health and Safety Act, the Migrant and Seasonal Agricultural Worker Protection Act, the Federal Coal Mine Health and Safety Act, and the Labor Management Reporting and Disclosure Act, enforcement actions brought on behalf of the National Highway Traffic Safety Administration, affirmative Department of Agriculture litigation, suits on behalf of the Department of Housing and Urban Development to enjoin violations of the Interstate Land Sales Full Disclosure Act, and suits to enjoin state and local interference with federal functions.

4-6.320 Area 2 -- Nondiscrimination Personnel Litigation

This area includes suits arising from federal governmental employment including constitutional and other issues of appointment and removal of officers and employees of the United States. Also included in this area are cases challenging Office of Personnel Management regulations, actions under the Federal Employee Health Benefits Act, and actions challenging various disciplinary and adverse actions brought by employees pursuant to the Civil Service Reform Act and the Whistleblower Protection Act. Litigation in this area arises primarily in district court and before the Merit Systems Protection Board.

4-6.330 Area 3 -- Government Information

A. Contacts in Civil Division: General: Anne L. Weismann, Assistant Director (514-3395); David J. Anderson, Director (514-3354). Right to Financial Privacy Act: Arthur R. Goldberg (514-4783). Federal Advisory Committee Act: Eric Goulian (514-4686).

B. Civil Division Policies regarding handling of these types of cases: United States Attorneys should inform the appellate staff (Leonard Schaitman, 514-3441) immediately if a stay pending appeal of an order couched in terms of an injunction is denied in FOIA or Privacy Act suits. Otherwise, the cases should be handled administratively like any other defensive cases.

4-6.332 Area 3 -- Government Information -- General Information for Particular Case Types (Including Jurisdiction and Exhaustion of Administrative Remedies)

A. FOIA.

Pre-litigation FOIA Requests for Documents. See 28 C.F.R. §§ 16.1 through 16.10, for detailed instructions for responding to pre-litigation Freedom of Information Act requests. *See also* 5 U.S.C. § 552, *as amended*. Nine categories of government records are exempt from disclosure under the FOIA. See 28 C.F.R. § 16.10(b)(3), as to the necessity for referring requests for information classified by another agency to that agency.

In the event of a request for documents from a USAO, the request should be forwarded to the Executive Office for United States Attorneys, FOIA/PA Unit, pursuant to 28 C.F.R. Part 16.3(a). The Federal Programs Branch is responsible for litigation and does not have any responsibilities relating to the administrative processing of FOIA or Privacy Act requests for documents in USAOs.

FOIA Suits. Expedited handling is essential in FOIA suits, inasmuch as the Act provides that such litigation is to take precedence. *See* 5 U.S.C. § 552(a)(4)(D). Because the time for serving an Answer or Motion to Dismiss is reduced to thirty days, care should be taken to ensure that the government's time to respond is

protected. The Federal Programs Branch can provide advice and assistance if necessary. Interim relief is generally not permitted under the FOIA; therefore, in the event an emergency hearing is scheduled, the relief requested should ordinarily be opposed.

Branch attorneys directly handle a number of FOIA cases. However, United States Attorneys should anticipate that the majority of FOIA cases filed in their respective districts will be assigned to the United States Attorneys for handling. This responsibility contemplates that the Assistant United States Attorney assigned to the case will conduct a full review of the withheld documents to determine whether withholding is legally justified. The Assistant United States Attorney is also responsible, with assistance from the agency General Counsel, for drafting and reviewing affidavits, preparing responses to interrogatories, preparing pleadings, and oral argument.

A general discussion of the requirements of the FOIA and current caselaw is available in the "Freedom of Information Case List" published by DOJ's Office of Information and Privacy each September. Copies can be ordered from that office (514-4251).

Exhaustion of administrative remedies is required before suit may be brought, but exhaustion may be deemed to have occurred if the agency exceeds statutory time limits in processing FOIA requests or appeals. *See* 5 U.S.C. § 552(a)(6). The statute generally provides for de novo review without reference to any administrative record made in the agency. 5 U.S.C. § 552(a)(4)(B). You should note, however, that in challenges to agency determinations regarding waiver of fees for processing FOIA requests, the 1986 amendment to the statute provides for de novo review on the record made before the agency. 5 U.S.C. § 552(a)(4)(vii). "Reverse" FOIA cases, in which a submitter of information sues to prevent an agency's proposed release of the information under the FOIA are brought pursuant to the APA, and the APA standard of review applies.

Orders for disclosure in FOIA suits will ordinarily be phrased as injunctions. Thus, it is necessary to seek a stay from such an adverse order to preserve the right of appeal. If a stay is denied, telephonic notice should be given the Federal Programs Branch. It is important to furnish immediately to the Branch a copy of all opinions and orders entered. This is essential to assure appropriate appellate consideration and to enable the Department to satisfy its statutory reporting requirements. *See* 5 U.S.C. § 552(e).

B. Privacy Act. The Privacy Act imposes stringent requirements affecting the maintenance of records concerning individuals. *See* 5 U.S.C. § 552a. Subsection (b) sets forth eleven circumstances under which records concerning an individual can be disclosed without the individual's prior written consent. Subsection (e)(8) requires that there be "reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record." Subsection (g) establishes judicial remedies available to persons aggrieved under the Act. OMB guidelines are published at 40 Fed. Reg. 28948, *et seq*.

Exhaustion of administrative remedies is required. *See* 5 U.S.C. § 552a(g)(1). Jurisdiction for Privacy Act suits covers suits for both money and specific relief. Access to government records of an individual, and the amendment of such records, are provided for by 5 U.S.C. 552a(g). A plaintiff is entitled to a trial de novo. Jurisdiction includes express authorization for injunctive actions, both to prevent a government agency from withholding records and to compel their production. *See* 5 U.S.C. § 552a(g)(3). In an action brought for failure to maintain an individual's record with accuracy, or for failure to comply with any of the Act's other provisions in such a way as to have an adverse effect on the individual, the individual can recover damages if the agency acted intentionally or willfully. Damages can in no event be less than $1000 together with costs and reasonable attorney fees. Venue is set forth in 5 U.S.C. § 552a(g)(5), as is the limitations provision.

If a court order is adverse and phrased as an injunction, a stay should be timely sought to preserve the right of appeal. It is important to furnish immediately to the Branch a copy of all opinions and orders entered.

Awareness of the Privacy Act is also important during discovery in non-Privacy Act cases since documents requested in discovery in a variety of cases can be subject to the Privacy Act. This is particularly true in cases involving personnel issues or personnel files. Documents subject to the Privacy Act should not be produced in

discovery until the Act's requirements involving disclosure of such information have been met. Note that many agencies have published "routine uses" under the Act (5 U.S.C. § 552a(b)(3)) which provide for the release of certain records to the Department of Justice or to parties in litigation. The agency should be able to provide citations in the federal register to such publications.

C. Right to Financial Privacy Act. There are no administrative remedies to be exhausted as a prerequisite to litigation under the Right to Financial Privacy Act. Jurisdiction for such suits covers actions for both money damages and specific injunctive relief. The Act prohibits any agency or department from obtaining (or any private "financial institution" as defined in 12 U.S.C. § 3401(1) from disclosing) the financial records of a financial institution's "customer" as defined in 12 U.S.C. § 3401(5), except where access is authorized by one of the express exceptions to the Act or is accomplished through one of the five access mechanisms mandated by the Act: (1) customer authorization; (2) administrative summons or subpoena; (3) search warrant; (4) judicial subpoena; or (5) formal written request. For further information on transfer restrictions and remedies under the Act, see Civil Resource Manual at 90.

D. Government In The Sunshine Act. The Government in the Sunshine Act, 5 U.S.C. § 552b, sets forth specific requirements pertaining to notices of agency meetings and requirements for record keeping of such meetings. Sunshine Act litigation is discussed in the Civil Division Practice Manual at § 3-46.1, *et seq*. *See* also Berg and Klitzman. An Interpretive Guide to the Government in the Sunshine Act, published by the Administrative Conference of the United States in June 1978.

E. Production of Documents of Other Departments and Agencies in Non-FOIA Litigation. On occasion, litigants in private lawsuits may issue a subpoena for deposition or trial testimony, or a subpoena duces tecum requiring production of information or documents which a client agency deems confidential or otherwise privileged from disclosure. Protection against the compulsory disclosure of such documents or information is recognized in various circumstances. *See* 5 U.S.C. § 301; *Jencks v. United States*, 353 U.S. 657 (1957); *United States v. Reynolds*, 345 U.S. 1 (1953); *Touhy v. Ragen*, 340 U.S. 462 (1951); *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951); *Saunders v. Great Western Sugar Co.*, 396 F.2d 794 (10th Cir. 1968).

If a government employee served with such a subpoena seeks advice from the United States Attorney, he/she should be told to contact his/her own agency for instructions, because, if the agency does not object to compliance, the Department of Justice usually will not. If the agency wishes to object, however, it usually will have pertinent regulations (promulgated under 5 U.S.C. § 301), similar to the DOJ regulations at 28 C.F.R. § 16.21, *et seq*., instructing employees not to produce or testify unless authorized to do so by a designated official (usually the head of the agency or his/her designee). Such regulations are ordinarily recognized as a valid basis on which to refuse to produce documents or testify. *See Touhy v. Ragen*, 340 U.S. at 657; *Saunders v. Great Western Sugar Co.*, 396 F.2d at 794. State courts also usually honor such regulations. *See People v. Parham*, 60 Cal.2d 378, 384 P.2d 1001, *cert. denied*, 377 U.S. 945, *reh'g denied* 379 U.S. 873 (1964). For the procedure to be followed in the event of an adverse decision, *see North Carolina v. Carr*, 264 F. Supp. 75 (W.D.N.C.), *appeal dism.*, 386 F.2d 129 (4th Cir. 1967).

Requiring compliance with such regulations is not considered to be a claim of privilege, and the regulations do not create a privilege against discovery. There are, however, several common law privileges available only to the government. These include the military or state secrets privilege, which is absolute if validly claimed, and the deliberative process, informant's, law enforcement evidentiary, and required reports privileges, which are qualified. There are also privileges available for certain types of presidential documents.

In certain instances, a formal claim of privilege may be required to be made by the head of the agency involved. *See United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967). It is not necessary to make a "formal" claim of privilege in objecting to production of documents, but it is necessary in opposing a motion to compel or moving to quash a subpoena. United States Attorneys should not make a formal claim of a privilege available only to the government in any case without approval from the Civil Division.

F. Justice Department Materials and Witnesses. 28 C.F.R. §§ 16.21 to 16.28 regulate the production of DOJ information or records pursuant to subpoena or court demands when the United States is not a party to the lawsuit:

> (N)o employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official status without prior approval of the proper Department official in accordance with 16.24 and 16.25 of this part.

4-6.340 Area 4 -- Human Resources

This area includes all suits involving Medicare and Medicaid, and the various state-federal cash assistance or welfare programs (e.g., Aid to Families with Dependent Children, foster care, emergency assistance programs), as well as Public Health Service cases, Indian Health Service cases, and Randolph Shepard Act cases.

4-6.350 Area 5 -- Housing

This area includes all equitable housing and housing-related cases involving the Department of Housing and Urban Development and other government agencies. It includes cases involving Title VIII-Fair Housing, suspension or debarments of HUD contractors and agents, Federal Housing Administration Insured Housing Programs (single and multifamily), Government National Mortgage Association (GNMA), National Flood Insurance Act, Federal Crime Insurance Act, McKinney Act, Interstate Land Sales Act-defensive suits, Housing and Community Development Act-Section 8 leased housing program, Community Development Block Grant Program, conventional low rent public housing program, tenants' rights, procedures and grievances regarding rent increases, utility rate conversions, evictions, etc., disaster relief (mobile homes), HUD relocation benefits, challenges to HUD refusal to expend funds, nonjudicial foreclosure, miscellaneous HUD program litigation and Farmers Home Administration and Veterans Administration Housing Program litigation, and litigation under the McKinney Act.

4-6.360 Area 6 -- National Security, Military and Foreign Relations

This area includes suits involving the Department of Defense, including the military departments, the Department of State, the Central Intelligence Agency, the Selective Service, cases arising out of federal law enforcement activities, "Bivens" litigation against Executive Branch officials, Legislative Branch officials and Judicial Branch officials where the main issue is not money damages, military base closing and realignment litigation, military discharge, enlistment contracts, and correction of military records cases, National Security Act, secrecy agreements, and miscellaneous intelligence litigation, miscellaneous law enforcement litigation, challenges to the Child Protection Restoration and Penalties Enhancement Act of 1990, Radiation Exposure Compensation Act claims, miscellaneous military litigation, foreign relations litigation, Selective Service System, Army Corps of Engineers projects, military non-promotion and missing in action litigation, Military Medical Program challenges, and enforcement of intelligence subpoenas.

4-6.370 Area 7 -- Energy, Agriculture, Interior

This area includes cases involving the programs of the Departments of Energy, Agriculture and Interior. Among the Agriculture cases in this area are those involving the Food Stamp Program, the Agricultural Adjustment Act, Commodity Marketing Orders, Packers & Stockyards Act, Federal Crop Insurance Corporation,

Animal Welfare Act, Federal Meat Inspection Act, Poultry Products Inspection Act, and Commodity Price Support programs. Area 7 does not include housing programs of the Farmers Home Administration, which fall within Area 5. Energy Department cases in this area include those involving nuclear energy policy, and other energy research and development programs. A limited number of cases arising from energy price control programs also remain. Most Interior Department litigation is within the jurisdiction of the Environment and Natural Resources Division. A limited number of cases not relating to environmental issues, such as First Amendment cases on the use of public property, are within this area.

4-6.380 Area 8 -- Foreign and Domestic Commerce

This area includes challenges to the programs of the Department of Treasury, Labor, Commerce, and Transportation and other matters involving interstate and foreign commerce that cross agency lines, such as the Davis-Bacon Act, the Service Contract Act, unemployment compensation and other programs. Treasury Department matters include representation of the Office of Foreign Assets Control in cases brought under the Trading with the Enemy Act, International Emergency Economic Powers Act, and Foreign Assets Control Regulations; the Bureau of Alcohol, Tobacco and Firearms in cases under the Brady Act, the semiautomatic assault weapons ban of the 1994 Crime Act, firearms license litigation and miscellaneous ATF cases; miscellaneous Customs Service litigation; and miscellaneous Treasury litigation and matters. Labor Department representation includes Employment and Training Administration alien worker (H-1A, 1B, 2A) programs and other litigation; Fair Labor Standards Act; Labor Management-Reporting & Disclosure Act; Davis-Bacon Act; Office of Workers Compensation Programs/ Federal Employees Compensation Act; Occupational Safety & Health Act; and miscellaneous Labor program challenges. Commerce Department cases and matters involve Bureau of the Census; Export Administration Act; National Weather Service; and miscellaneous Commerce litigation and matters. Department of Transportation representation includes litigation and matters involving Federal Aviation Administration; Coast Guard; Federal Highway Administration; Maritime Administration; Federal Railroad Administration; and miscellaneous other Transportation programs and issues.

4-6.385 Area 9 -- Government Corporations and Regulatory Agencies

This area includes actions against various regulatory agencies and corporations, and suits involving agencies or matters not otherwise covered by the above subject matter areas which are handled by the Federal Programs Branch, including Small Business Administration cases, Farm Credit Administration cases, Federal election laws, postal fraud and obscenity, Federal Communications Act, miscellaneous GSA cases, veterans benefits cases, other Veterans Administration litigation, Railway Labor Act, NASA cases, miscellaneous Postal Service matters, Federal Trade Commission, Religious Freedom Restoration Act and other religion issues, National Endowment for the Arts and Humanities cases, postal rates and classifications, TVA cases, miscellaneous cases involving White House agencies and officials, and actions against the Legislative and Judicial branches and officials of those branches.

4-6.390 Area 10 -- Employment Discrimination Litigation

This area includes all suits challenging government employment decisions or regulations affecting employment on the basis of prohibited discrimination, including Title VII, Equal Pay Act, Age Discrimination in Employment Act, Rehabilitation Act (handicapped discrimination-federal employees), Executive Order 11246, Title VI, Title IX, Civil Rights Attorneys' Fee Awards, and Equal Education Opportunities litigation.

The passage of the Civil Rights Act of 1991 has significantly affected the defense of employment discrimination suits by the Department. The advent of compensatory damages for intentional discrimination and the availability of jury trials have resulted in a greater number of cases being filed and a marked increase in the

number of cases settled. While *Landgraf v. USI Film Products, Inc.*, ___ U.S. ___, 114 S.Ct. 1483 (1994), held that substantive changes to the law are not retroactive, numerous issues remain to be resolved regarding compensatory damages, taxability, interest, bifurcation of pre- and post-Act claims, etc. In addition, there is a compelling need for coordination between the Civil Division and the Civil Rights Division on issues which affect the Department's enforcement and defensive litigation. Accordingly, Assistant United States Attorneys should raise issues of first impression with one of the Assistant Directors who supervise Area 10 cases.

Frequently, plaintiffs also sue individual employees for damages in sexual harassment cases. When the individual defendant seeks departmental representation, close examination of the facts and circumstances is necessary to determine whether the employee's action is within the scope of employment and whether representation is in the interest of the United States. In presenting such requests, the

individual defendant must deny the allegations of sexual harassment or explain the circumstances. Please assist agency counsel in obtaining all the necessary information in a timely manner to process such requests for representation.

4-6.391 Retaliation Claims Made By Federal Employees Under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Rehabilitation Act

Regulations issued by the Equal Employment Opportunity Commission expressly provide that claims of retaliation by federal employees are actionable under Title VII of the Civil Rights Act, 42 U.S.C. 2000e *et seq.*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a, and the Rehabilitation Act, 42 U.S.C. 791. *See* 29 C.F.R. 1614.101; 1614.103(a). Moreover, the Solicitor General has argued in the Supreme Court that such claims are actionable. See Brief for the Respondent in *Hunt v. Secretary of the Army*, Sup. Ct. No. 95-5801 (Nov. 29, 1995).

Questions may be directed to Anne Gulyassy of the Federal Programs Branch at (202) 514-3527; civ04(agulyass) or Marleigh Dover of the Appellate Staff at (202) 514-3511; civ08(mdover).

4-6.392 Compensatory Damages Cap Under Section 102 of the Civil Rights Act of 1991, 42 U.S.C. 1981a(b)

In Section 102 of the Civil Rights Act of 1991, 42 U.S.C. 1981a(b), Congress for the first time made compensatory damages available to federal employees who establish that they have been victims of intentional discrimination prohibited by Title VII and the Rehabilitation Act. Section 1981a(a)(1)(b)(3) provides that "[i]n an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 * * * the complaining party may recover compensatory * * * damages as allowed in subsection (b) of this section * * *." Subsection (b) provides that in the case of an employer with more than 500 employees, "[t]he sum of the amount of compensatory damages shall not exceed, for each complaining party" $300,000.

The Acting Solicitor General has determined that the $300,000 cap applies per lawsuit such that a plaintiff cannot recover more than $300,000 in a single lawsuit, no matter how many claims are alleged in the complaint. A model argument, prepared by the Appellate Staff of the Civil Division, articulating the position of the United States, is available. *See* Civil Resource Manual at 91. For additional information on how the cap applies, see the Civil Resource Manual at 92.

Questions may be directed to Jennifer Rivera of the Federal Programs Branch at (202) 514-3671; civ04(jrivera) or Marleigh Dover of the Appellate Staff at (202)514-3511; civ08(mdover). Ms. Rivera or Ms. Dover should be advised of any decisions issued which address this issue.

4-6.395 Area 11 -- Disability Benefits and Employment Litigation

Area 11 has two primary sub-units. Well over half of the cases involve challenges to the $52 billion a year social security benefits program. This includes Social Security Act Title II (disability insurance) and Title XVI (supplemental security income) benefits litigation. Individual claims for benefits are delegated to the USAOs, with the Civil Division handling large class actions or other significant challenges to the administrative scheme. Defense of employment disability-related cases involving the Rehabilitation Act of 1973, the Americans with Disabilities Act, and the Family and Medical Leave Act are the other large group of cases in this area. In 1992, Congress amended the Rehabilitation Act to make the employment standards of Title I of the Americans with Disabilities Act (ADA) applicable to discrimination actions under sections 501 and 504 of the Rehabilitation Act, 29 U.S.C. 791(g), 794(d). The Civil Division coordinates with the Civil Rights Division on cases affecting the latter's enforcement responsibilities under the ADA. Finally, discrete areas of litigation involving the Social Security Administration, such as challenges to the Coal Industry Retiree Health Benefits Act of 1992, are under this section.

4-6.396 Social Security Act Review Procedure

Over eight thousand actions were brought in federal district courts in 1995 challenging administrative determinations of the Commissioner of the Social Security Administration. *See* 42 U.S.C. § 405, for judicial review, 42 U.S.C. § 409 to 411, 416, for definitions, and 42 U.S.C. § 423, for disability cases. Regulations promulgated under the authority of 42 U.S.C. § 405(a) dealing with disability cases appear in 20 C.F.R. Parts 400 to 499.

Title 42 U.S.C. § 405(g) contemplates an administrative review proceeding. Title 42 U.S.C. § 405(b) imposes on the Commissioner of Social Security the duty of making findings of fact and a decision as to the rights of any individual applying for payments. Title 42 U.S.C. § 405(g) requires that a certified copy of the transcript of the administrative record be filed with the government's answer to the complaint and after completing administrative proceedings in certain remand cases. Judicial review must be had in accordance with 42 U.S.C. § 405(g). *See Heckler v. Ringer*, 466 U.S. 602 (1984).

Only "final decisions" of the Commissioner of Social Security are reviewable. 42 U.S.C. § 405(g) Normally a claimant must exhaust his or her administrative remedies. The Commissioner can waive the exhaustion requirement, and the courts can waive the requirement upon a showing that the claim is collateral to a claim for benefits and that irreparable harm would ensue absent immediate relief. *See Mathews v. Eldridge*, 424 U.S. 323 (1976). 42 U.S.C. § 405(g) provides that judicial review must be sought within 60 days of the Commissioner's final decision. The Supreme Court has held that this is not a jurisdictional requirement but is a period of limitations which can be tolled by the Commissioner and, in rare cases, by the courts. *Bowen v. City of New York*, 106 S.Ct. 2022, 90 L.Ed.2d 426 (1986). If a motion to dismiss is to be filed for failure to exhaust administrative remedies or untimely filing, the Office of Appellate Operations, Office of Hearings and Appeals of the Social Security Administration (SSA), can provide an affidavit reciting the relevant facts. Pursuant to P.L. No. 103-296, the Social Security Independence and Program Improvements Act of 1994, the function of the Secretary of Health and Human Services in Social Security cases was transferred to the Commissioner of Social Security effective March 31, 1995. In accordance with section 106(d) of P.L. 103-296, Commissioner of Social Security, was substituted for the Secretary of Health and Human Services, as the defendant in cases during the transition period further action needed to continue pending suits. For additional information on Social Security Act review procedures, see the Civil Resource Manual at 93.

4-6.397 Judgment Authorized

Section 405(g) of Title 42 provides that a court may affirm, reverse, or remand the decision of the Commissioner. Often plaintiffs' counsel will move for remand in order to adduce further evidence for the record. There must, however, be "good cause" for a remand (i.e., the proffered evidence must be new and material, and that good cause must be shown by the proponent for the failure to incorporate such evidence into the record during the prior proceedings). *See Cotton v. Bowen*, 799 F.2d 1403, 1409 (9th Cir. 1986); *Willis v. Secretary of Health and Human Services*, 727 F.2d 551, 553 (6th Cir. 1984); *Chandler v. Secretary of Health and Human Services*, 722 F.2d 369 (8th Cir. 1983). The circuits have held that in order for the proffered evidence to be "material" there must be a reasonable possibility that it would have changed the outcome of the administrative determination had it been considered earlier. *See, e.g.*, *Cotton v. Bowen*, 799 F.2d 1403; *Chaney v. Schweiker*, 659 F.2d 676, 679 (5th Cir. 1981). A lost or inaudible recording tape of the administrative hearing is also good cause for remand. H.R. Rep. No. 944, 96th Cong., 2d Sess. 59 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 1392, 1406-07. For additional information on the types of judgments authorized under the Social Security Act, see the Civil Resource Manual at 94.

4-6.398 Social Security Act Attorney Fees

Section 406(b) of Title 42 authorizes the award of reasonable attorney fees, up to a maximum of 25 percent of past due benefits, for successful representation of social security claimants before the court. The majority rule is that the court can award fees only for services rendered in connection with proceedings before the court and may not award fees for services before the Social Security Administration. *See Gardner v. Menendex*, 373 F.2d 488, 490 (1st Cir. 1967); *Burgo v. Harris*, 527 F. Supp. 1157 (E.D.N.Y. 1981); *Guido v. Schweiker*, 775 F.2d 107 (3d Cir. 1985); *Ray v. Gardner*, 387 F.2d 162, 165 (4th Cir. 1967); *Gardner v. Mitchell*, 391 F.2d 582, 583 (5th Cir. 1968); *Horenstein v. Secretary of Health and Human Services*, 35 F.3d 261 (6th Cir. 1994) (en banc); *Smith v. Sullivan*, 986 F.2d 232 (8th Cir. 1993); *MacDonald v. Weinberger*, 512 F.2d 144, 146 (9th Cir. 1975); and *Harris v. Secretary of Health and Human Services*, 836 F.2d 496 (10th Cir. 1987).

The Social Security Act § 206 fee is not in addition to the benefits, but is subtracted from the claimant's award. Several courts of appeals have condemned the practice of routinely awarding the 25 percent statutory maximum without examination of what fee is reasonable in the particular case. *MacDonald v. Weinberger*, 512 F.2d 144, 146-47 (9th Cir. 1975); *Webb v. Richardson*, 472 F.2d 529, 537-38 (6th Cir. 1972) overruled on other grounds by *Horenstein v. Secretary of Health and Human Services*, 35 F.3d 261 (6th Cir. 1994) (en banc); *McKittrick v. Gardner*, 378 F.2d 872 (4th Cir. 1967). Equal Access to Justice Act fees, 28 U.S.C. § 2412, are not paid out of the claimant's award. Additional cases which oppose routine 25-percent fee awards include: *Wells v. Sullivan*, 907 F.2d 367 (2d Cir. 1990); *Coup v. Heckler*, 834 F.2d 313 (3d Cir. 1987); *McGuire v. Sullivan*, 873 F.2d 974 (7th Cir. 1989); *Cotter v. Bowen*, 879 F.2d 359 (8th Cir. 1989); *Starr v. Bowen*, 831 F.2d 359 (9th Cir. 1987); *but see Rodriguez v. Bowen*, 865 F.2d 739 (6th Cir. 1989) (25 percent contingent fee agreement is rebuttable presumption of reasonable fee).

All applications for fee awards should, as a routine matter, be forwarded to the General Counsel's office in the Social Security Administration for review and determination of whether the application should be opposed. When the court enters an order awarding attorney fees in a Social Security Act review case, SSA will release the § 206 fees to plaintiff's attorney unless the United States Attorney advises the Civil Division and SSA within thirty days of SSA's receipt of the fee award that the award exceeds statutory limits or is excessive under the circumstances.

4-6.399 Telefax Critical Mail Procedures

Because of the large volume of Social Security cases filed each year, it is imperative that the Office of General Counsel (OGC), Social Security Administration (SSA) receive notification of suit within three days from service of the Summons and Complaint on a United States Attorney. The telefax should be routed to Answer

Staff of OGC (703) 305-1271 and to the Office of Hearings and Appeals (703) 305-0623 (4th, 5th, 6th, 7th, and 10th Cir); (703) 305-0739 (1st, 2d, 3rd, 8th, 9th, 11th and D.C. Cir.) please provide the following information:

1. Case caption;
2. Plaintiff's Social Security number;
3. District court where case was filed;
4. Date complaint was filed;
5. Date United States Attorney was served;
6. Name and telephone number of Assistant United States Attorney handling the case; and
7. Date a petition in forma pauperis was filed, if applicable.

Similarly, when a USAO is served with an order requiring compliance and action by SSA during the trial of the case, the following information should be telefaxed via the same routing indicator as above:

1. Case caption;
2. Plaintiff's Social Security number;
3. Type of order issued;
4. Operative time limits for SSA action; and
5. Name and telephone number of the Assistant United States Attorney handling the case.

Copies of summonses and complaints and other pleadings and material filed prior to the government's initial responses should be mailed to:

Office of the General Counsel
Social Security Division
Answer Staff
5107 Leesburg Pike
Room 1704 Skyline Towers
Falls Church, VA 22041-3255

In addition, SSA has designated certain items as "critical" and such items are to be forwarded to a special post office box. Items considered to be "critical" include: adverse court orders such as Magistrate and court reversals, remands, motions for, or threats or contempt or default, or any court order which contains a time limit for action to be commenced or completed by the Commissioner. Such items should be forwarded to:

Office of the General Counsel
Social Security Administration
Post Office Box 17054
Baltimore, Maryland 21203

All other, non-critical items including non-program matters, such as tort actions, employment laws against SSA, should be addressed to:

Office of the General Counsel
Social Security Administration
6401 Security Boulevard
Room 611, Altmeyer Building
Baltimore, Maryland 21235